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Supreme Court, U.S.
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No. 96-1981

In the Supreme Court of the United States

OCTOBER TERM, 1996

BARBARA BELL,
PETITIONER,

v.

PLANNED PARENTHOOD LEAGUE OF MASSACHUSETTS, INC.,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the buffer zone injunction issued against petitioner Barbara Bell alone, to prevent her from further blocking of patients, further violating prior court orders, and further shouting loudly into a medical facility, is an unconstitutional content-based restriction on speech.

II. Whether the fifty-foot distance restriction imposed on Bell alone burdens more speech than necessary to serve the significant government interests of ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counseling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders, given that three prior court orders have failed to restrain Bell from engaging in objectionable conduct.

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Respondent Planned Parenthood League of Massachusetts, Inc. ("Planned Parenthood") respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Massachusetts, Appendix C to the petition.

STATEMENT OF THE CASE

Having engaged in purposeful behavior including harassing and intimidating patients attempting to enter a Planned Parenthood clinic (the "Clinic") by crowding them and blocking their way in violation of a court order, shouting so loudly that her voice could be heard clearly within the Clinic, and wearing a cloth "pinney" falsely representing herself as an agent of the Clinic in violation of another court order, petitioner Barbara Bell argues that the fifty-foot buffer zone imposed on her alone to prevent her from further engaging in such objectionable conduct is an unconstitutional content-based restriction on her speech. Alternatively, Bell argues that the injunction is overbroad and that the court should have issued an order addressing only the volume of her voice. Bell's arguments did not succeed in the Massachusetts Supreme Judicial Court and cannot succeed here.

The buffer zone injunction against Bell was issued by the trial court after two days of evidentiary hearings which included testimony of five witnesses as well as the submission of affidavits and a videotape showing Bell's conduct outside the Clinic. Based upon this evidence, the trial judge concluded that "Bell creates an actionable nuisance" and issued the preliminary injunction "based on three categories of Bell's activity: her wearing of pinneys in violation of [one] court order, the volume of her voice, and her blocking of patients in violation of [another] court order." Petition, 20a.

The SJC conducted a de novo review of the record, Petition, 20a, and upheld the trial court's findings.

> After careful consideration of the entire record, we agree with the judge's findings and conclude that the factual characteristics of Bell's *activity* place it outside the realm of constitutionally protected speech.

Id. (emphasis added)

The SJC carefully reviewed each category of Bell's activity at issue. First, the SJC noted that Bell's violation of the pinney injunction was "amply demonstrated by live testimony and by videotape evidence which clearly depicts Bell outside the Clinic on several occasions wearing a pinney closely resembling those worn by the Clinic escorts." Petition, 20a. The SJC rejected Bell's argument that she did not violate the injunction because her pinney differed slightly from the Clinic escort pinneys,[1] explaining that the SJC's own review of the videotape evidence convinced it that the

> slight factual dissimilarities do not sufficiently differentiate Bell's pinneys such that patients would not easily mistake her as an affiliate of the clinic, particularly in light of potential language barriers and the short time frame during which a patient approached by Bell and the escorts must process who is who.

Petition, 21a. Moreover, there was evidence that patients did in fact become confused and assume Bell was an escort. Petition, 4a, 15a. The SJC concluded (as to Bell's wearing of a pinney) that "[t]he First Amendment does not shelter Bell's persistent violation of an existing court order." Petition, 21a.

With regard to the volume of Bell's voice, Bell did not contest the trial court's well-substantiated finding that the volume of her voice is such that despite the Clinic's measures to diminish its impact, her voice reaches the interior of the Clinic."[2] *Id.*, 22a. Bell argued instead that the injunction was based upon the content of her speech, and not its volume. The SJC rejected Bell's argument on the grounds that:

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[1] The SJC noted that "Bell's argument is rendered suspect by her practice of changing pinneys to correspond with the color worn by the clinic escorts," a practice that was testified to by three witnesses. Petition 20a-21a, n. 7.

[2] As the SJC noted in its decision, "[e]ven a witness appearing on Bell's behalf testified that Bell 'talked into the clinic,' raising her voice so as to be heard by the women inside." Petition, 22a.

> any person bellowing into the entrance of a medical facility creates a noxious and unwelcome condition inside, regardless of what he or she is shouting. After careful consideration of the record, we cannot conclude that the judge based the injunction on the content of Bell's speech rather than on the volume of her voice ..... Bell's practice of hollering into the Clinic is clearly actionable conduct unprotected by the First Amendment.

Petition, 22a-23a. *See Madsen* v. *Women's Health Ctr., Inc.*, 512 U.S. 753, 772-773 (1994), *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 783-84, n. 12 (1979); *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 508-509 (1978); (each recognizing that noise control is particularly important around hospitals and medical facilities).

Finally, the SJC rejected Bell's challenge of the trial court finding that she blocked patients seeking to enter the clinic. The SJC noted that all five witnesses who testified during the evidentiary hearings — including a fellow "sidewalk counselor" who testified on Bell's behalf — confirmed that Bell stood in front of patients as they attempted to enter the Clinic. *Id.*, 23a.

> One witness testified that Bell's conduct included "blocking, standing so close to the patients so that they can't move." The witness described the efforts of the clinic escorts to assist patients in getting past Bell; "We'll just get into position beside the patient, one on each side, and we'll try to go on forward, and on the worst scenario, Barbara Bell will be in front facing us, and when we move to one side, she'll move to one side, and we'll move to the other side, and she'll move to the other side, too. We're kind of doing a dance down the street." Another witness stated that when snowbanks bound the sidewalk, patients could not get past Bell unless they pushed into her or climbed over the snowbank. There was also tes-

timony that Bell stood closely in front of car doors, "trapping" patients in their cars.

Petition, 23a

The SJC concluded that:

> The record amply demonstrates that Bell, who is a tall and large woman, routinely positioned herself so as to impede and obstruct the progress or passage of patients to the Clinic, thereby engaging in behavior which constitutes "blocking" in the most basic sense of the word.

Petition, 24a.

Based upon its review of the entire record, and applying this Court's holding in *Madsen*, 512 U.S. at 761-765, the SJC concluded that the injunction is content neutral:

> Bell's blocking of patients, her repeated violation of prior court orders, and the volume of her shouting is objectionable activity unsheltered by the First Amendment. We therefore reject Bell's claims that the preliminary injunction is content or viewpoint based. The purpose of the injunction is not to suppress her antiabortion message, but rather to prevent her from further engaging in objectionable activity.

Petition, 25a.

Having determined that the injunction is content neutral, the SJC next considered Bell's argument that the fifty-foot restriction is constitutionally overbroad. Applying the test set forth in *Madsen* to evaluate the constitutionality of a content-neutral injunction, the SJC asked whether the injunction "burden[s] no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765; *Schenck* v. *Pro-Choice Network of Western New York*, __ U.S. __, 117

S. Ct. 855, 864 (1997). The trial court had determined that the interests served by the injunction include "ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counseling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders." The SJC, applying this Court's rulings in *Madsen* and in *Schenck*, agreed that these interests are certainly significant enough to justify an appropriately tailored injunction to secure unimpeded physical access to the clinics." Petition, 26a.

With regard to the scope of the injunction, the SJC noted that three prior court orders had failed to restrain Bell from engaging in objectionable behavior. The SJC rejected Bell's claim that "the court should have ignored Bell's violation of the pinney and antiblocking injunctions, leaving those issues to be tried in separate contempt proceedings, and imposed the less restrictive remedy of ordering her to lower her voice." Petition, 27a. The SJC held that the trial judge was required to consider the full extent of Bell's conduct, and held that the trial judge had "properly issued an injunction that effectively addressed all three forms of Bell's unprotected conduct." *Id.* The SJC concluded:

> In sum, under the injunction, Bell would be far enough away so that she could no longer obstruct patient access, be heard inside the clinic, or be mistaken for a clinic escort because of her pinney. . . . On balance, we think that the fifty-foot distance restriction imposed on Bell burdens no more speech than necessary to serve the significant public interests at stake.

Petition, 27a.

No justice of the SJC dissented from the court's decision upholding the buffer zone injunction against Bell.

REASONS FOR DENYING THE WRIT

No important issue of federal law is presented by the SJC decision. The decision upholds issuance of a buffer zone injunction against one individual based upon that individual's conduct and this Court's recent rulings in *Madsen*, 512 U.S. 753 (1994) and *Schenck*, __ U.S. __, 117 S. Ct. 855 (1997). Applying the rulings of *Madsen* and *Schenck* to the facts of this case, the SJC held first that the injunction is content neutral because the purpose of the injunction was not to suppress Bell's antiabortion message but rather to prevent her from engaging further in objectionable conduct. Petition, 25a. *See Madsen*, 512 U.S. at 761-765. The SJC then considered Bell's conduct, which included blocking patients' access into the Clinic in violation of a court order, shouting loudly such that her voice could be heard clearly within the Clinic, and wearing a pinney falsely representing herself as an agent of the Clinic in violation of another court order. Based upon this conduct, the SJC concluded that the buffer zone injunction against Bell is constitutional because it "burden[s] no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765, *Schenck*, 117 S. Ct. at 864.

I. The Fifty-Foot Buffer Zone Injunction Is Content Neutral

Bell attempts to persuade this Court that she is a "solitary, non-violent picketer" attempting to converse with patients approaching the Clinic, and that it is the content of her speech that caused the trial court to issue the buffer zone injunction. The factual record of this case demonstrates that this is simply not so. It was Bell's conduct that caused Planned Parenthood to seek—and the trial court to issue—the buffer zone injunction, and it is Bell's conduct that justifies issuance of the injunction without reference to the content of Bell's speech.

See Madsen, 512 U.S. at 763, quoting *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989).

In *Madsen*, this Court considered whether an injunction similar to the one at issue (except that the *Madsen* injunction applied to numerous individuals and groups, instead of only one person) was content or viewpoint based because it restricted only the speech of antiabortion protestors. *Madsen* at 762. The Court rejected the argument, explaining that "an injunction, by its nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group." *Id.* Thus, to determine content neutrality, a court must look to the purpose of the injunction. In *Madsen*, this Court determined that an injunction was content-neutral where the state court [had] imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court s original order." *Id.* at 763.

Here, contrary to Bell's claims, the injunction was not issued to prevent Bell's antiabortion message from being heard. Bell is distinguishable from the other antiabortion protestors outside the Clinic, including so-called "sidewalk counselors," not because of the content of her message (which is probably the same as or similar to the many other sidewalk counselors who picket the Clinic and are *not* subject to any buffer zone) but because of her particular objectionable conduct while delivering her message. The record of this case (as discussed above at pp. 2-6) amply supports the SJC's conclusion that Bell engaged in "objectionable activity unsheltered by the First Amendment." Petition, 25a. Thus, applying this Court's test set forth in *Madsen*, the SJC properly concluded that the injunction is not content or viewpoint based because:

> [t]he purpose of the injunction is not to suppress her antiabortion message, but rather to prevent her from further engaging in objectionable activity.

Petition, 25a.

II. The Injunction Burdens No More Speech Than Necessary To Achieve Significant Government Interests

The test for determining the constitutionality of a content-neutral injunction is now well settled: such an injunction must "burden no more speech than necessary to serve a significant government interest." *Madsen*, 512 U.S. at 765; *Schenck*, __ U.S. __, 117 S. Ct. at 864.[3] In both *Madsen* and *Schenck*, this Court upheld fixed[4] buffer zone injunctions, issued as remedies against conduct interfering with access to abortion, on the grounds that the injunctions "burden[ed] no more speech than necessary to serve a significant governmental interest." *Madsen, supra; Schenck, supra.* As the SJC decision makes clear, the injunction at issue here was upheld based upon the same grounds. Indeed, as the SJC noted, the injunction against Bell is "significantly narrower" than that upheld in *Madsen*, in that the Bell injunction is directed to only one individual who has a long history before the court," Petition, 26a, whereas the *Madsen* injunction was directed at numerous individuals and organizations, as well as "all persons acting in concert or participating with them, or on their behalf." *Madsen*, 512 U.S. at 759, n. 1.

Here, the fifty-foot buffer zone injunction is directed

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[3] Given this Court's decisions in *Madsen* and *Schenck*, it is puzzling how Bell can assert that "[t]here is no precedent for this type of injunction." Petition, 21.

[4] In *Schenck*, the Court also considered a challenge to a "floating" buffer zone restriction which prohibited demonstrating "within fifteen feet of any person or vehicle seeking access to or leaving [abortion] facilities." *Schenck*, __ U.S. __, 117 S. Ct. at 861, n. 3. The Court struck down this restriction on the grounds that because the prohibition "floats", it would be difficult for a protestor to know how to remain in compliance, and the "lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at __, 117 S. Ct. 867. Petitioner's reliance on *Schenck* to support her argument that the injunction at issue is overbroad is misguided. The injunction against Bell is a *fixed* fifty foot restriction, and thus creates none of the uncertainty that caused this Court to strike down the "floating" provision in Schenck.

against only one individual whose objectionable behavior has not been restrained by three prior court orders.[5] Bell has violated prior injunctions by continuing to represent herself as a clinic affiliate and by blocking patients seeking to enter the clinic, and the sound amplification order "has not achieved its purpose because Bell's unamplified voice can still be heard inside the clinic." Petition, at 26a. *See Madsen*, 512 U.S. at 770 ("failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order").[6] Bell's contention that the proper remedy would have been to order her to lower her voice was rejected by the trial court and the SJC, on the grounds that such an order would not address the full range of Bell's objectionable conduct.

> The judge was required to consider the full extent of Bell's conduct as shown by the plaintiff in the case before her, including the violations, in determining whether Bell created a public nuisance. Having considered all of the testimony, as well as the prior orders, the judge properly issued an injunction that effectively addressed all three forms of Bell's unprotected conduct.

Petition 27a.

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[5] This injunction is easily distinguished from the one ruled unconstitutional by the Ninth Circuit in *U.S.* v. *Dinwiddie*, 76 F.3d 913 (9th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 613 (1996). The *Dinwiddie* injunction applied within 500 feet of any reproductive health facility in the United States, and allowed the defendant to engage only in activity "that could not be remotely construed to violate [the Fedeal clinic access act]." The Ninth Circuit held, among other things, that the term "remotely construed" was vague and the injunction as worded burdened more speed than necessary. *Id.*, at 927-928. Here, the injunction prohibits Bell only from entering within fifty feet of one clinic, and there is no issue as to vagueness.

[6] The interests served by the injunction include "ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counseling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders." Petition, 26a, *see also Madsen*, 512 U.S. at 767-69; *Schenck*, 117 S. Ct. at 866, Bell acknowledges that "the state does have a significant interest in assuring patients' access to clinics and maintaining quiet inside clinics." Petition, 19.

The "alternative remedy" proposed by Bell addresses only one form of Bell's objectionable conduct (the volume of her voice) and ignores Bell's wearing of a pinney falsely representing that she is affiliated with the Clinic in violation of a prior injunction and Bell's blocking of patients' access into the Clinic in violation of another injunction. Bell's proposed alternative fails to serve the significant government interests of "ensuring public safety and order, protecting a woman's freedom to seek lawful medical and counseling services, protecting the physical and psychological well-being of patients, and maintaining the integrity of court orders," Petition, 26A, and was thus properly rejected by the trial court as inadequate.

Finally, the injunction does leave an adequate means of communication open to Bell. Bell remains free to say whatever she wishes provided that she remains fifty feet away from the clinic entrance.[7] Given the volume of Bell's voice, the SJC concluded that from that distance "she can still be seen and heard by patients arriving at the clinic." *See Madsen*, 512 U.S. at 770 (protestors outside the buffer zone could still be seen and heard from the clinic parking lots).[8]

CONCLUSION

In upholding the fifty-foot buffer zone injunction against petitioner Barbara Bell alone, the SJC did not make new federal law. The SJC applied the test for assessing the constitutionality of a buffer zone injunction, adopted by this Court in *Madsen* in 1994, and affirmed in *Schenck* in 1997, to the

[7] Bell has never contested the size of the buffer zone, Petition, 27a, n. 12 and cannot do so here for the first time.

[8] Bell complains that this alternative is not adequate because "the nature of sidewalk counseling necessitates that the counselor speak in a conversational tone with the pregnant woman," and "[t]he injunction makes this impossible." Petition at 22. Bell's complaint is ironic given that the volume of Bell's voice (which was certainly not at a conversational level) was one aspect of Bell's conduct that caused Planned Parenthood to seek this injunction.

factual circumstances of this case, and determined that the content-neutral buffer zone injunction is constitutional because it "burden[s] no more speech than necessary to serve a significant governmental interest."

Bell's petition for a writ of certiorari should be denied.

Respectfully submitted,

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